**TAN HENG CHEW & ORS** A

**v.**

**TAN KIM HOR & ORS**

COURT OF APPEAL, PUTRAJAYA B
MOKHTAR SIDIN JCA
MOHD GHAZALI YUSOFF JCA
TENGKU BAHARUDIN SHAH JCA
[CIVIL APPEAL NO: W-02-367-2005]
7 NOVEMBER 2008 C

***COMPANY LAW:*** *Winding up - Petition - Striking out - Whether petitioners filed verifying affidavit - Whether petition a nullity - Companies (Winding-up) Rules 1972, r. 26*

D

The petitioners presented a winding up petition to wind up one Tan Chong Consolidated Sdn Bhd under s. 218(1)(i) of the Companies Act 1965. The petition had yet to be heard by the High Court due to a flurry of interlocutory applications filed by the parties and appeals to this court that followed as a consequence of those applications. The respondents filed three striking out applications, with the second striking out application forming the subject matter of this appeal. There was only one issue: whether the petitioners filed an Affidavit Verifying Petition ('AVP') as required by r. 26 of the Companies (Winding-up) Rules 1972 ('Rules') in the High Court. E F

**Held (dismissing the appeal)**
**Per Mohd Ghazali Yusoff JCA delivering the judgment of the court:**

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**(1)** In his grounds of judgment, the High Court judge found that the respondents were aware of the existence of the AVP because it had been referred to by the parties in the first striking out proceedings. Further, the AVP formed part of the record of appeal for the purpose of the appeal to this court, and was referred to by the parties in the High Court, this court and the Federal Court. With the existence of the AVP in the court records the petition could not be said to be a nullity. Rule 26 of the Rules had been complied with and, hence, no breach had arisen. (para 13) H I

A ***Bahasa Malaysia*** *Translation Of Headnotes*

Pempetisyen telah mengemukakan satu petisyen penggulungan untuk menggulungkan sebuah syarikat bernama Tan Chong Consolidated Sdn Bhd di bawah s. 218(1)(i) Akta Syarikat 1965. Petisyen itu belum lagi didengar oleh Mahkamah Tinggi disebabkan beberapa permohonan interlokutori yang difailkan oleh pihak-pihak dan rayuan-rayuan berikutnya ke mahkamah ini yang diakibatkan oleh permohonan-permohonan itu. Responden memfail tiga permohonan untuk membatal, dengan permohonan untuk membatal kedua membentuk isi rayuan ini. Hanya terdapat satu isu: sama ada pempetisyen memfail sesuatu Affidavit Penentusahan Petisyen ('APP') seperti yang diperlukan oleh k. 26 Kaedah-kaedah (Penggulungan) Syarikat 1972 ('Kaedah-kaedah') dalam Mahkamah Tinggi.

**Diputuskan (menolak rayuan)**
**Oleh Mohd Ghazalli Yusoff HMR menyampaikan penghakiman mahkamah:**

**(1)** Dalam alasan penghakimannya, hakim Mahkamah Tinggi membuat keputusan bahawa responden sedar tentang kewujudan APP kerana ia telah dirujuk oleh pihak-pihak dalam prosiding untuk membatal pertama. Tambahan lagi, APP membentuk sebahagian rekod rayuan bagi tujuan rayuan ke mahkamah ini, dan telah dirujuk oleh pihak-pihak di Mahkamah Tinggi, mahkamah ini dan Mahkamah Persekutuan. Dengan kewujudan APP dalam rekod-rekod mahkamah petisyen itu tidak boleh dikatakan sebagai sesuatu pembatalan. Kaedah 26 Kaedah-kaedah telah dipatuhi dan, oleh itu, tiada apa-apa pelanggaran yang timbul.

**Case(s) referred to:**
*Tan Kim Hor & Ors v. Tan Heng Chew & Ors [2003] 1 CLJ 634 CA* ***(refd)***

**Legislation referred to:**
Companies Act 1965, ss. 218(1)(i), 221
Companies (Winding Up) Rules 1972, rr. 26, 193, 194

*For the appellants - Low Khian Leong (Low Chi Cheng, Tan Sin Shih & Kho Yiong San with him); M/s Lim Kian Leong & Co*
*For the respondents - Cecil Abraham (Yei Kei Kan & Sunil Abraham with him); M/s Shearn Delamore & Co*

*[Appeal from High Court, Kuala Lumpur; Companies Winding Petition No: D3(D2)-28-507-2001]*

*Reported by Suresh Nathan*

## JUDGMENT

**Mohd Ghazali Yusoff JCA:**

**[1]** The petitioners (the respondents in this appeal) presented a winding-up petition on 21 May 2001 to wind up Tan Chong Consolidated Sdn Bhd (the 9th respondent in the petition and the 9th appellant in this appeal and hereafter referred to as "the company") on the "just and equitable" ground, ie, s. 218(1)(i) of the Companies Act 1965 ("the Act"). Both parties are members of the Tan Chong family and are embroiled in a protracted family feud. We will hereafter refer to the parties as they were in the petition, *viz.*, the appellants here will be referred to as the respondents and the respondents here will be referred to as the petitioners.

**[2]** The petition has yet to be heard by the High Court due to a flurry of interlocutory applications filed by the parties and appeals to this court that followed as a consequence of those applications. Three striking out applications were filed by the respondents. We will only refer to the 1st and 2nd striking out applications. The 2nd striking out application is the subject-matter of this appeal.

### The 1st Striking Out Application

**[3]** About four months after the presentation of the petition, the respondents filed their 1st striking out application. It was allowed by Zainun Ali J (as she then was) on 9 October 2001. She held that the petition was an abuse of process of the court and that the petitioners failed to show any just and equitable ground to wind up the company. The petitioners' appeal to this court against that decision was allowed and the order to strike out the petition was set aside (see *Tan Kim Hor & Ors v. Tan Heng Chew & Ors* [2003] 1 CLJ 634).

A **The 2nd Striking Out Application (encl. 146)**

**[4]** On 14 July 2004, ie, about three years after the presentation of the petition, the respondents filed a 2nd striking out application made by way of notice of motion. This application to strike out is
B the subject-matter of this judgment.

**[5]** The orders sought for in this application were that "the present re-amended petition be struck out" and for costs. The grounds of the application were as follows:

C (i) it appears that the petitioners have not filed an Affidavit Verifying Petition ("AVP") which is required by r. 26 of the Companies (Winding Up) Rules 1972 )("the Rules");

(ii) a court's file search on 9 July 2004 confirms that the court's
D file does not contain the requisite AVP;

(iii) this failure was drawn to the attention of the petitioners in the respondents' affidavit affirmed on 5 February 2004;

(iv) the absence of such AVP means that there is in fact no
E *prima facie* evidence before this court;

(v) such failure is fatal to the petition as such failure goes to the root of the present action;

F (vi) the petitioners appear to have attempted to rectify their mistake by filing an application to re-amend the petition on 15 January 2004 which included a prayer that the "petitioners be given liberty to file affidavit(s) verifying petition pursuant to r. 26 of the Companies (Winding Up)
G Rules 1972";

(vii) such prayer sought by the petitioners only asks for leave to file "affidavit(s)" verifying petition pursuant to r. 26; there was no attempt by the petitioners to address the issue of lateness and to extend the time for filing an AVP verifying
H the petition dated 21 May 2001; and

(viii) no AVP has been filed prior to this application nor has any attempt been made to extend the time to file.

I

**[6]** Rule 26 of the Rules reads:

> Every petition for the winding-up of a company by the Court shall be verified by an affidavit referring thereto. The affidavit in Form 7 shall be made by the petitioner or by one of the petitioners, if more than one, or, in case the petition is presented by a corporation, by some director, secretary or other principal officer thereof, and shall be sworn after and filed within four days after the the petition is presented, and the affidavit shall be *prima facie* evidence of the statements in the petition.

## Petitioners Application For Extension/Abridgment Of Time To File AVP (encl. 152)

**[7]** On 20 July 2004, ie, about six days after the 2nd striking out application was filed, the petitioners filed an application by way of notice of motion for the following orders:

(a) that leave be given to the petitioners, if necessary, to re-file the AVP affirmed by Tan Kim Hor (the 1st petitioner) on 23 May 2001 and filed in court on 24 May 2001 within four days from the date of this order pursuant to s. 221 of the Act and/or under the inherent jurisdiction of the court;

(b) alternatively, an extension of time or an abridgement of time be given to the petitioners, if necessary, to file the AVP affirmed by Tan Kim Hor (the 1st petitioner) on 23 May 2001 within four days from the date of this order pursuant s. 221 of the Act and/or r. 193 and r. 194 of the Rules and/or under the inherent jurisdiction of the court.

**[8]** The grounds of the application are as follows:

(i) on 30 June 2004 the respondents' solicitors notified the petitioners' solicitors that the AVP affirmed by Tan Kim Hor (the 1st petitioner) on 23 May 2001 may not have been filed in court;

(ii) in an abundance of caution and upon the threat of the respondents to again apply to strike out this petition, the petitioners have filed this application;

(iii) the petitioners' former solicitors have confirmed that the AVP was filed in court on 24 May 2001;

(iv) the AVP formed part of the appeal record *vide* Civil Appeal No. W-03-45-2001 between the same parties herein; the respondents' solicitors agreed that the AVP formed part of the cause papers in the High Court proceedings and therefore agreed to include the same into the appeal record;

(v) the respondents' solicitors were and are still fully aware of the existence of the AVP and do not dispute that they had been duly served with a copy of the AVP;

(vi) the non-filing of the AVP (if at all) has certainly caused no prejudice to the respondents;

(vii) rule 193 of the Rules expressly provides that an extension of time or an abridgement of time can be granted in this instance;

(viii) rule 194 of the Rules expressly provides that no formal defect shall invalidate the proceedings;

(ix) justice of the case dictates that this application should be allowed.

**Judgment Of The High Court In Relation To Both Enclosures 146 And 152**

**[9]** On 22 February 2005 Zulkefli Ahmad Makinudin J (as he then was) delivered his oral decision in Bahasa Malaysia on both enclosures. His grounds of decision, dated 24 March 2005, duly translated into English as appearing in the appeal record (pp. 79-80) reads:

> **Decision:**
>
> After examining the affidavits that have been filed for the petitioners and the respondents and after examining the submission of the petitioners' counsel and the respondents' counsel, I arrive at a decision for the petitioners' application in Enclosure (152) and the respondents' application in Enclosure (146) as follows:
>
> I find the respondents' filing of the application to strike out the Amended Petition on the ground that no affidavit verifying petition has been filed will only delay the hearing of the winding-up petition that has been adjourned for a long time after it has been fixed for hearing in this Court and after the Court of Appeal allowed the petitioners' appeal on 23-1-2003.

I am also of the view that if the respondents' ground to strike out the Amended Petition this time is on the ground that no affidavit verifying petition has been filed, it is stated that on 25-5-2004 the petitioners have filed the affidavit verifying petition to the Amended Petition after this Court allowed the petitioners' application to amend the winding-up petition.

I find that if the respondents give similar grounds to that in their Notice to the petitioners' lawyers dated 30-6-2004 that the affidavit verifying petition dated 23-5-2001 to the original petition is not filed in Court, it is only but a frivolous ground. This is so because the respondents are aware of the existence of the said affidavit verifying petition because the said affidavit has been referred to by the parties in the previous proceedings before this during the respondents' application to strike out the petition.

I find that the respondents have agreed to the inclusion of the said affidavit verifying petition to the Record of Appeal for the petitioners' previous appeal to the Court of Appeal.

I find that the petitioners' lawyers themselves have stated that they have conducted a search on the Court's file and found that the said affidavit verifying petition is in the file. In any event, the petition is fixed for hearing, it is the amended petition that will be heard which has been verified by the petitioners' affidavit. The issue on the existence of the original petition no longer arises because there is only the Amended Petition before this Court.

Based on the grounds stated above there is no necessity for the petitioner to apply for leave to re-file the affidavit verifying petition dated 23-5-2001. I therefore dismiss the petitioners' application in Enclosure (152).

Since I have decided that the Petitioners' Amended Petition is in order valid, I therefore dismiss the respondents' application in Enclosure (146) too.

Lastly, there is no order as to costs against any party for both the proceedings of hearing the application in Enclosure (146) and the application in Enclosure (152).

**[10]** As a result of the above decision, the respondents appealed to this court. We had on 13 June 2006, in a unanimous decision, dismissed the appeal relating to encl. 146, ie, the 2nd application to strike out the petition.

**[11]** There is only one issue, namely, whether the AVP affirmed by Tan Kim Hor, the 1st petitioner affirmed on 23 May 2001 was filed in the High Court on 24 May 2001. The petitioners have produced filing receipts Nos. WV 140273 and WV 142974 and a copy of the Kuala Lumpur High Court Daily Collection Statement dated 24 May 2001 as proof of filing.

**[12]** It was not disputed that the petitioners presented the petition on 21 May 2001. The filing receipts confirm that the AVP was filed on 24 May 2001. It was also not disputed that on 9 October 2001, the respondents' 1st application to strike out the petition was allowed by the High Court and that the petitioners appealed to this court against that decision. The said AVP formed part of the record of appeal. On 29 January 2003, the appeal was allowed by this court and the order to strike out was set aside. The respondents then filed an application for leave to appeal to the Federal Court. That leave application was dismissed on 29 October 2003.

**[13]** In his grounds of judgment Zulkefli Ahmad Makinudin J found that the respondents were aware of the existence of the said AVP because it had been referred to by the parties in the 1st striking out proceedings. Further the said AVP formed part of the record of appeal for the purpose of the appeal to this court. The AVP was referred to by the parties in the High Court, this court and the Federal Court. With the existence of the AVP in the court records we cannot see how it can be argued that the petition can be said to be a nullity. Rule 26 of the Rules has been complied with and hence no breach has arisen.

**[14]** For the above reasons, we dismissed this appeal with costs and ordered the deposit to be remitted to the petitioners to account of taxed costs.